

4-0800-5873-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE LAWFUL GAMBLING CONTROL BOARD

In the Matter of the
Proposed Rules Governing
Lawful Gambling, Minn.
Rules Parts 7861.0010
to 7865.0040

REPORT_OF_THE
ADMINISTRATIVE
LAW_JUDGE

The above-entitled matter came on for hearing before Peter C. Erickson, Administrative Law Judge, at 9:30 a.m. on Thursday, December 5, 1991, in Room 107 of the State Capitol Building, St. Paul, Minnesota. This Report is part of a rulemaking proceeding pursuant to Minn. Stat. §§ 14.131 to 14.20, to determine whether the Minnesota Lawful Gambling Control Board (hereinafter "Board") has fulfilled all relevant, substantive, and procedural requirements of law, to determine whether the proposed rules are needed and reasonable, to determine whether the Board has statutory authority to adopt the proposed rules, and to determine whether or not the proposed rules, if modified, are substantially different from the rules as originally proposed.

John Garry and E. Joseph Newton, Special Assistant Attorneys General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Lawful Gambling Control Board. Nan Connor, Board Compliance Officer, 1711 West County Road B, Suite 300 South, Roseville, Minnesota 55117, also appeared on behalf of the Board. The hearing continued until all interested groups and/or persons had had an opportunity to comment concerning the proposed rules.

The Lawful Gambling Control Board must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review

Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of

Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural_Requirements

1. On September 24, 1991, the Board filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the pro
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A Statement of Additional Notice.

2. On October 14, 1991, a Notice of Hearing and a copy of the proposed rules were published at 16 State Register pp. 909-950.

3. On November 4, 1991, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice.

4. On November 12, 1991, the Board filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.

- (d) An Affidavit of Additional Notice.
- (e) The names of Board personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (f) A copy of the State Register containing the proposed rules.
- (g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 15 State Register p. 1879, February 25, 1991 and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

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5. The period for submission of written comment and statements remained open through December 19, 1991, the period having been extended by order of the Administrative Law Judge to 14 calendar days following the hearing. The record closed on December 24, 1991, the third business day following the close of the comment period.

6. Pursuant to Minn. Stat. § 14.115, the Board considered each of the methods for reducing the impact of the proposed rules on small business as contained in subdivision 2 of that section. That consideration is set forth in the Board's Statement of Need and Reasonableness. The Board has determined that the proposed rules cannot be rewritten to impose less of a burden on small business and still accomplish the purposes intended by Minn. Stat. chapter 349 and these proposed rules.

7. Minn. Stat. § 16A.128 requires that any proposed rules which set fees must receive the approval of the Commissioner of Finance prior to the promulgation of the rules. These proposed rules do establish fees for various licenses issued by the Board. However, all of the fees contained in the proposed rules are already mandated by Minnesota Statutes, chapter 349, so the requirements of Minn. Stat. § 16A.128 are not applicable.

Statutory_Authority

8. Pursuant to Minn. Stat. § 349.151, subd. 4(a)(1), the Board is empowered "to regulate lawful gambling to ensure it is conducted in the public interest". The Board is specifically authorized "to make rules authorized by this chapter" pursuant to subdivision 4(a)(5) of that section. Except as may be specifically modified below, the Board has demonstrated its general

statutory authority to adopt the proposed rules herein.

Nature_of_the_Proposed_Rules

9. In an effort to improve the regulation of lawful gambling in this State, the Minnesota Lawful Gambling Control Board has proposed to rescind existing rules and promulgate a comprehensive set of new rules. This is being done because chapter 349 which governs lawful gambling has been revised by the Minnesota Legislature during the 1989, 1990 and 1991 sessions. The existing rules do not reflect those revisions. In addition, the existing rules are difficult for licensed entities to use because of the language used and organizational structure. These propos

Modifications_Made_to_the_Proposed_Rules_by_the_Board

10. This Finding will set forth all of the modifications to the proposed rules made by the Board subsequent to the publication of the rules in the State Register. Some of these modifications were proposed at the hearing and others made subsequent to the hearing after the Board had reviewed all of the oral testimony and written comments submitted. This lengthy Finding is

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included for the benefit of all persons who raised questions concerning specific rule provisions so that any modifications made can be easily found below. Additionally, some of these modifications were required due to changes made to chapter 349 during the 1990 legislative session. See, 1991 Laws, ch. 336, art. 2. This Finding will not duplicate initially proposed rule language which has been retained in the modified version. The modifications made are:

EDITOR'S NOTE: In the interest of brevity, this lengthy Finding which detailed all of the textual changes, has been deleted.

Discussion_of_the_Proposed_Rules

12. There were only a few comments and/or objections raised concerning the proposed rules which were not remedied by the modifications set forth above. Some of these will be discussed below. Except as specifically modified in the following Findings, the Judge finds that the need for and

reasonableness of the proposed rules, as modified above, has been demonstrated by an affirmative presentation of facts.¹

13. Steve Baker objected to the restrictiveness imposed by Rule 7861.0020, subp. 12B.(3) on behalf of Accountax, Inc., a public accounting firm. He stated that the referenced rule, which prohibits an assistant gambling manager from participation in the "conduct of lawful gambling for more than one organization" is too restrictive when several organizations use the same site for gambling operations but wish to "share" an assistant gambling manager.

The Board contends that the purpose behind the rule is to prevent the commercialization of lawful gambling and to ensure the integrity of its operations. It asserts that allowing assistant gambling managers to work for multiple organizations would essentially permit the manager to act as a "consultant" for several operations and remove control of the gambling from those organizations. The Judge finds that the reasons set forth by the Board show a rational basis for the rule and that the need for and reasonableness of the proposed rule has been shown.

14. VFW Post Number 295 and Roger Franke commented in opposition to proposed Rule 7861.0090, subpart 1B. which prohibits an organization from selling or putting out for play any tipboard which does not have the tipboard tickets for that tipboard attached to it. Both commentators argue that there is no need for the proposed rule and that its effect will be to reduce the ability of organizations to efficiently sell multiple games of tipboards during special events. The VFW Post states that currently, an organization will remove the chances from up to 12 tipboards and sell all of the tipboards simultaneously.

The Board contends that the purpose of the requirement in the proposed rule is to preclude the use of pull-tab games in conjunction with tipboard game seal cards sales to exceed the \$250 pull-tab prize limit. Additionally, the Board states that this proposed rule is a general security measure designed to preserve the integrity of the game and the accuracy of the reporting of both distributors and organizations. The Judge finds that the need for and reasonableness of the proposed rule has been demonstrated by the Board. However, the Board does concede that this issue is one which deserves further consideration in light of the objections raised. The Judge agrees and suggests further review by the Board.

15. King Wilson, on behalf of Allied Charities of Min

1In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved.

Broen_Memorial_Home_v._Minnesota_Department_of
Human_Services, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may
either
be adjudicative facts or legislative facts.
Manufactured_Housing_Institute_v.
Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a
reasoned determination has been made. Manufactured_Housing_Institute at 246.

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specifically removed authority for the Board to promulgate rules specifying
"allowable expenses" from Minn. Stat. § 349.15.

The Board states that:

In the 1991 regular session, the Legislature enacted a
statutory provision defining "allowable expense" as "an
expense directly related to the conduct of lawful
gambling." 1991 Minn. Laws ch. 336, art. 2, § 10.
Accompanying this statutory definition was the elimination
of paragraphs (b)-(d) in Minn. Stat. § 349.15, which
listed certain allowable and non-allowable expenses and
required the board to promulgate rules specifying
allowable expenses. 1991 Minn. Laws ch. 336, art. 2,
§ 13. These statutory changes may have reduced or
eliminated the board's authority to establish by rule a
finite list of expenditures that constitute allowable
expenses. However, the board clearly has the authority to
promulgate rules interpreting and giving more specific
meaning to the statutory definition of allowable expense.
This rule implements that authority.

Pursuant to Minn. Stat. § 349.151, subd. 4(a)(5), the Board has power to
"make rules authorized by this chapter". Prior to the 1991 legislative
session, there was no definition for the term "allowable expense" contained
in
chapter 349. Additionally, Minn. Stat. § 349.15(b) stated that "the Board
shall provide by rule for the administration of this section, including
specifying allowable expenses". During the 1991 session, the Legislature
defined "allowable expense" and deleted specific statutory authority for the
Board to promulgate rules enumerating what constitutes an "allowable
expense".

The Board clearly is empowered to promulgate rules authorized by chapter
349. However, there is no longer any statutory authority for the Board to
specify allowable expenses and the Legislature has taken it upon itself to
enact a statutory definition of "allowable expense". Absent legislative
history for these changes in the record, the Judge is compelled to interpret
legislative intent as removing any authority for the Board to establish, by

rule, what constitutes an allowable expense. The Legislature must have wanted its statutory definition to control that determination. Consequently, the Judge finds that the Board does not have statutory authority to promulgate proposed Rule 7861.0120, subpart 5B.(2).² In order to correct this defect, the Board must delete proposed Rule 7861.0120, subpart 5B.(2).

²The result of the legislative action is that a series of contested cases or district court actions may be required before a uniform policy is established concerning the interpretation of what constitutes an "allowable expense". If the Legislature had wanted the Board to make those policy decisions by rule, it would not have removed the statutory authority contained in Minn. Stat. § 349.15(b) (1990). The Judge cannot conclude that the legislative action was mere inadvertence or that the Legislature intended the Board to continue rule promulgation concerning the definition of "allowable expense" without specific authority.

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Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

1. That the Board gave proper notice of the hearing in this matter.
2. That the Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subs. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.
3. That the Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Finding 15.
4. That the Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).
5. That the amendments and additions to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.
6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 as noted at Finding 15.
7. That due to Conclusion 3, this Report has been submitted to the Chief

Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 10th day of January, 1992.

s/Peter C. Erickson
PETER C. ERICKSON
Administrative Law Judge

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REPORT OF THE
CHIEF ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for review by the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subs. 3 and 4, which provide:

Subd. 3. Finding_of_substantial_change. If the [administrative law judge's] report contains a finding that a rule has been modified in a way which makes it substantially

different from that which was originally proposed, or that the agency has not met the requirements of sections 14.131 to 14.18, it shall be submitted to the chief administrative law judge for approval. If the chief administrative law judge approves the finding of the administrative law judge, the chief administrative law judge shall advise the agency and the revisor of statutes of actions which will correct the defects. The agency shall not adopt the rule until the chief administrative law judge determines that the defects have been correcte

Subd. 4. Need_or_reasonableness_not_established. If the chief administrative law judge determines that the need for or reasonableness of the rule has not been established pursuant to section 14.14, subdivision 2, and if the agency does not elect to follow the suggested actions of the chief administrative law judge to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not adopt the rule until it has received and considered the advice of the commission. However, the agency is not required to delay adoption longer than 30 days after the commission has received the agency's submission. Advice of the commission shall not be binding on the agency.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge in all respects.

In order to correct the defects enumerated by the Administrative Law Judge, the agency shall either take the action recommended by the Administrative Law Judge or reconvene the rule hearing if appropriate. If the

agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Administrative Law Judge, it shall submit to the Chief Administrative Law Judge a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Administrative Law Judge will then make a determination as to whether the defects have been corrected and whether the modifications in the rules are substantial changes.

Should the agency make changes in the rules other than those recommended by the Administrative Law Judge, it shall also submit the complete record to the Chief Administrative Law Judge for a review on the issue of substantial change.

Dated: January _13_, 1992.

WILLIAM G. BROWN
Chief Administrative Law Judge